

FEDERAL COMMUNICATIONS COMMISSION
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In Reply Refer to:
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In re: WVOA(FM), DeRuyter, New York, Fac. ID 22134
File No. BALH-20000414ABM
Assignment of License

Dear Counsel:

The staff has under consideration: (1) the above captioned application proposing to assign the license of Station WVOA(FM) from Cram Communications, L.L.C. to Clear Channel Broadcasting Licensees, Inc. ("Clear Channel"); (2) a petition to deny that application, filed on May 31, 2000 by Galaxy Communications, L.P. "(Galaxy)"¹; and (3) additional responsive pleadings.² For the reasons set forth below, we deny the petition and grant the application.

Background. Clear Channel is currently the licensee of four Syracuse radio stations,³ as well as four stations licensed to nearby communities.⁴ While Clear Channel's proposed acquisition of WVOA(FM) is consistent with the numerical limits in our radio local ownership rules, 47 C.F.R. §73.3555,⁵ the Commission "flagged" the *Public Notice* announcing receipt of

¹ Galaxy is the licensee of stations WTKW(FM), Bridgeport, New York, WKRL(FM) and WTLA(AM), North Syracuse, New York, WTKV(FM)/WSGO(AM), Oswego, New York, WKRH(FM), Minetto, New York, and WZUN(FM) (formerly WRDS(FM)), Phoenix, New York.

² These documents include Clear Channel's June 13, 2000 opposition to the petition and Galaxy's June 29, 2000 reply.

³ These stations are WWHT(FM), WYYY(FM), WSYR(AM), and WHEN(AM).

⁴ These stations are WBSS(FM), Fulton, WPHR(FM) (formerly WHCD(FM)), Auburn, WOUR(FM), Utica, and WSKS(FM), Rome. In addition, Clear Channel is the proposed assignee of WLFH(AM), WOWB(FM), Little Falls, NY and WOWZ(FM), Whitesboro, NY (File Nos. BALH-20001120ABG-ABI).

⁵ Clear Channel's multiple ownership showing indicates that, using the Commission's current definition of "radio market," post-merger there would be three separate radio markets, each composed of 50 radio stations. *See Notice*

the applications on the grounds that the proposed transaction might raise concerns about competition and diversity.⁶ Galaxy filed a timely petition to deny the WVOA(FM) assignment application, raising competition concerns.

Galaxy alleges that approval of the subject transaction will have anti-competitive effects on local advertisers in the Syracuse market. Specifically, Galaxy states that Clear Channel “dominates” the Syracuse market, garnering approximately 48% of the radio advertising revenue, including owning the top two and the fourth of the top six highest-billing stations in the market. This dominance is also clear, according to Galaxy, when demographic segments and format are examined.⁷ Galaxy further notes that Clear Channel and Citadel Communications, the second largest Syracuse market owner,⁸ together control nearly 75% of the radio advertising revenue, in contravention of “both prongs of the Commission’s 50/70 analysis.”⁹ Allowing Clear Channel to purchase the “technically superior” facilities of WVOA(FM), according to Galaxy, would also increase the level of concentration to unacceptable levels under what it asserts is the Department of Justice’s primary indicator of market concentration, the Herfindahl-Hirschman Index (“HHI”).¹⁰

Discussion. We note initially that the Commission has not generally considered format

of *Proposed Rule Making, In the Matter of Definition of Radio Markets*, MM Docket No. 00-244, FCC 00-427 (December 13, 2000) (“*Market Definitions*”). A single licensee can therefore own up to 8 commercial stations in each of those markets, not more than 5 of which are in the same service (AM or FM). See Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), §202(b)(1) *codified as* 47 C.F.R. §73.3555(a)(1). If the proposed transaction is approved and consummated, in market 1, Clear Channel will own 7 stations (2 AM 5 FM), in market 2, 6 stations (2 AM 4 FM), in market 3, 4 stations (1 AM 3 FM).

⁶ *Public Notice*, Report No. 24724 (May 1, 2000). In public notices announcing the filing of radio broadcast sales applications, the Commission currently identifies for further competitive review (“flags”) those applications that would result in one entity controlling 50% or more of the advertising revenue in the relevant market or in the top two entities controlling 70% or more of that revenue. See *Shareholders of AMFM, Inc.*, 15 FCC Rcd 16,062, 16,070 (2000). The language used in such public notices is: “Based on our initial analysis of this application and other publicly available information, including advertising revenue share data from the BIA database, the Commission intends to conduct additional analysis of the ownership concentration in the relevant market. This analysis is undertaken pursuant to the Commission’s obligation under Section 310(d) of the Communications Act, 47 U.S.C. §310(d), to grant an application to transfer or assign a broadcast license or permit only if so doing served the public interest, convenience and necessity. We request that anyone interested in filing a response to this notice specifically address the issue of concentration and its effect on competition and diversity in the broadcast markets at issue and serve the response on the parties.”

⁷ Galaxy claims that Clear Channel owns three of the top eight stations in the 18-49, 25-49, and 25-54 age demographic categories. It also claims that, by format, Clear Channel owns the top-rated country station, the second-rated “contemporary hit radio” station, the top adult contemporary station, and the top talk radio and sports radio station.

⁸ We note that Citadel has recently filed applications to transfer control of its broadcast stations, including those in the Syracuse market, to an investment banking firm, FLCC Holdings, Inc.

⁹ See note 6, *supra*.

¹⁰ Galaxy notes that the Department considers a market to be “highly concentrated” if its HHI exceeds 1800; according to Galaxy, the HHI in Syracuse would be 3260 after Clear Channel’s acquisition of WVOA(FM).

or demographic shares – which Galaxy urges us to examine here – in its competitive analysis. *Great Empire Broadcasting*, 14 FCC Rcd 11145, 11152 (1999) (“*Great Empire*”). Furthermore, Galaxy’s argument concerning market concentration based on HHI is misplaced.¹¹ Because Clear Channel proposes to acquire a station with revenues below the threshold to have a reportable share using BIA data, there is no change or increase in concentration to be measured by the HHI. In any event, we have considered the potential competitive impact of this transaction and concluded that petitioner has not raised a substantial and material question of fact requiring further inquiry. Our independent analysis indicates that Clear Channel currently controls 48.8% of the advertising revenue in the Syracuse radio market. That figure will remain unchanged even if the instant assignment application is granted, since WVOA(FM)’s revenues are below the reportable advertising revenue share using BIA data. While a 48.8% share of advertising revenue is not insignificant, it is consistent with levels previously approved in other Commission cases. *See New City Communications, Inc.*, 12 FCC Rcd 3929 (1997) (approving transaction that would result in proposed assignee controlling 52.4% of radio advertising revenues in the market). Likewise, the combined 75.1% advertising revenue share of Clear Channel and Citadel, the other largest radio licensee in the market, does not pose disqualifying market concentration concerns under our existing cases. *See Shareholders of AMFM, Inc.*, 15 FCC Rcd 16062 (2000) (“*AMFM, Inc.*”) (approving transactions in Akron, Ohio and Cedar Rapids, Iowa, where the post-merger advertising share of the top two groups in the market would be 82.6% and 80.8%, respectively). We also note that apart from the stations licensed to both Clear Channel and Citadel, there are 20 stations in the Syracuse radio market licensed to 8 separate owners, including the 7 stations licensed to petitioner Galaxy. These include one Class C station, 10 Class B stations, and 9 Class A stations.

Additionally, Galaxy complains that the Commission’s definition of a “radio market” does not comport with economic reality and urges the staff to defer action on the WVOA(FM) application until it completes its review of those rules which establish that definition.¹²

The Commission’s recently released *Notice of Proposed Rule Making in Market Definitions*, *see* note 5, *supra*, seeks comment specifically on whether and how the Commission should modify the standard for defining radio markets and counting the number of stations in these markets. The rule making also seeks comment on whether and how the Commission should amend the methodology by which it determines the number of radio stations owned by a party in a radio market for purposes of applying the multiple ownership rules. In *Market Definitions*, the Commission specifically addressed the effect of the rule making proceeding on pending applications. As a general matter, noted the Commission, “we will continue to process applications under the existing standards, unless and until they are changed in this proceeding.

¹¹ The HHI measures relative market concentration and is used to evaluate the change in concentration that results from a proposed merger. *See* U.S. Department of Justice and the Federal Trade Commission, *Horizontal Merger Guidelines* (Issued Apr. 2, 1992, rev. Apr. 8, 1997).

¹² This definition was established in *Revision of Radio Rules and Policies*, 7 FCC Rcd 2755 (1992), *modified in part on recon.*, 7 FCC Rcd 6387 (1992), *further recon. granted in part*, 9 FCC Rcd 7183 (1994). The definition of radio market and calculation of the stations contributing to that market were not changed by the Telecommunications Act of 1996. *See also Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368 (1996).

In cases raising concerns about how we count the number of stations a party owns in a market, however, we will defer decision pending resolution of that issue in this proceeding.” *Market Definitions*, at ¶ 14. In this case, although Galaxy generally challenges as overinclusive the use of “overlapping signal contours” as the means for defining market boundaries, it does not allege that Clear Channel’s acquisition here falls into the narrow class of transactions on which the Commission decided to defer action, nor do we conclude that the instant transaction is in that narrow class of cases.

As the Commission explained in *Market Definitions*, it evaluates whether a proposed transaction complies with statutory ownership caps¹³ by first determining the boundaries of each market created by the transaction. Specifically, it looks to all stations that will be commonly owned after the proposed transaction is consummated and groups these stations into “markets” based on which stations share mutually overlapping signal contours. It then determines the total number of stations in a market by counting all stations whose principal community contours overlap the principal community contours of *any* one or more of the stations whose contours define the market. *See Market Definitions* at ¶¶ 3-4. Based on our current methodology, a station owned by an applicant might not count as an attributable interest in determining whether the applicant will comply with the numerical ownership cap in a market because it does not overlap all of the stations the applicant seeks to own in that market. Nonetheless, that same station may count for purposes of determining the total number of stations in that market, because it overlaps the contour of at least one station which defines the market. It was anomalous cases – where an applicant’s *own* existing holdings make a dispositive contribution to the total number of stations in the market, thereby “bumping” the applicant into a tier of permissible ownership that it could not otherwise reach – that proved especially troubling in past proceedings.¹⁴ Likewise, it is these anomalous cases which we believe the Commission intended to hold in abeyance pending the outcome of the rule making. The Clear Channel transaction is not in this category of cases. Here, even excluding all of Clear Channel’s stations (except those mutually overlapping stations forming the market) from the number of stations in each market created by the proposed transaction, enough stations remain in each market to permit the proposed common ownership. Accordingly, the proposed transaction does not warrant deferral.

We have examined the WVOA(FM) assignment application and find that the application comports with all statutory and regulatory requirements and that its approval would further the public interest, convenience, and necessity.

¹³ See Section 202(b)(1) of the Telecommunications Act of 1996, establishing four tiers of permissible ownership. Specifically, in a radio market with 45 or more commercial stations, a party may own up to 8 commercial radio stations, not more than 5 of which are in the same service; in a radio market with between 30 and 44 commercial stations, a party may own up to 7 commercial radio stations, not more than 4 of which are in the same service; in a radio market with between 15 and 29 commercial radio stations, a party may own up to 6 commercial radio stations, not more than 4 of which are in the same service; and in a radio market with 14 or fewer commercial radio stations, a party may own up to 5 commercial radio stations, not more than 3 of which are in the same service, except that a party may not own more than 50% of the stations in such a market.

¹⁴ See *Pine Bluff Radio, Inc.*, 14 FCC Rcd 6594 (1999) (Commissioners Susan Ness and Gloria Tristani, dissenting.) See also *Market Definitions* at ¶¶ 8-9 (proposing to “exclude from the count” of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market).

Accordingly, IT IS ORDERED, That, the Petition to Deny filed by Galaxy Communications, L.P. IS DENIED, and the application to assign the license of station WVOA(FM) from Cram Communications, L.L.C. to Clear Channel Broadcasting Licensees, Inc. (File No. BALH-20000414ABM) IS GRANTED.

Sincerely,

Linda Blair, Chief
Audio Service Division
Mass Media Bureau

cc: James R. Cooke, Esq.